Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

ROBERT E. PINE
Petitioner
vs.
THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS AT HOUSTON

PETITION FOR WRIT OF CERTIORARI

GEORGE W, LANG II
ATTORNEY AT LAW
7330 Woodoak
Houston, Texas 77040
(713) 937-0650

Attorney for Petitioner

28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the warrantless search of Petitioner's premises, and warrantless seizure of an allegedly cruelly-treated colt by a Brazoria County, Texas, Sheriff's Deputy, and subsequent admission of evidence pertaining to said colt, overruling Petitioner's Motion to Suppress, constituted a violation of Petitioner's protection against unreasonable searches and seizures as set forth in the Fourth Amendment to the United States Constitution, or was the search for and seizure of said colt justified by the so-called "exigent circumstances" exception to the general requirement of a warrant.

2. Whether the seizure of Petitioner's animals (including the colt referred to in No. 1, above) and commencement of civil forfeiture proceedings, followed by misdemeanor criminal prosecution of Petitioner, by the State of Texas, all for the same alleged conduct pertaining to cruelty to animals, violated Petitioner's right to protection against being "subject for the same offense to be twice put in jeopardy of life or limb", as set forth in the Fifth Amendment to the United States Constitution.

LIST OF ALL PARTIES AND COUNSEL TO THE PROCEEDINGS

Robert Edward Pine 3900 County Road 48 Rosharon, Texas 77583	Petitioner
George W. Lang II Attorney at Law Texas State Bar No. 11895690 7330 Woodoak Houston, Texas 77040	Counsel for Petitioner at trial and on appeal
THE STATE OF TEXAS: represented by	Respondent
Brazoria County District Attorney's Office Mary Peter Cudd, Assistant District Attorney Ron Helson, Assistant District Attorney Pat Sabesta, Assistant District Attorney 111 E. Locust Angleton, Texas 77515	

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS AT HOUSTON

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner, Robert E. Pine ("Petitioner"), requests that Writ of Certiorari issue to review the judgment of the Texas Fourteenth Court of Appeals at Houston, which affirmed Petitioner's conviction of cruelty to animals, in violation of TX. PENAL CODE Section 42.11, by the County Court of Law No. 3 and Probate Court of Brazoria County, Texas. Petitioner's petition for discretionary review of the Court of Appeals' judgment was refused by the Texas Court of Criminal Appeals on April 12, 1995. (App. E).

OPINIONS BELOW

The opinion of the Texas Fourteenth Court of Appeals at Houston is attached hereto, as Appendix A. (App. A), and is also reported at 889 SW2d 625.

STATEMENT OF JURISDICTION

The opinion of the Texas Fourteenth Court of Appeals at Houston was entered on December 1, 1994. (App. A and 889 SW2d 625). Petitioner's Motion for Rehearing was filed on December 15, 1994, and was denied by the Court of Appeals on December 22, 1994. (App. B and C, respectively). Petition for Discretionary Review with the Texas Court of Criminal Appeals was filed on January 23, 1995.

(App. D); said Court refused the petition on April 12, 1995. (App. E). The Texas Fourteenth Court of Appeals at Houston, pursuant to Texas Rules of Appellate Procedure, Rule 86(c), has stayed its mandate pending disposition of this Petition for Writ of Certiorari. (App. F). This Court, thus, has jurisdiction of this case pursuant to 28 U.S. Code, Section 1257 (a) and Rule 13.1, Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES IN THIS CASE

CONSTITUTION OF THE UNITED STATES

AMENDMENT 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

True and correct photocopies of TX. PENAL CODE, Sec. 42.09, (formerly Sec. 42.11), and TX. HEALTH & SAFETY CODE, Secs. 821. 021, et Seq., are Appendices G and H (App. G, App. H), respectfully.

STATEMENT OF THE CASE

(For reference, the following abbreviations shall be used herein: SF (Statement of Facts, verbatim record of in-court hearings and trial); T (Transcript, record of written documents filed with the trial court in this case).

Petitioner, Robert E. Pine (hereinafter "Petitioner"), is a 70-year old widower, residing on and operating a trailer park on real property at 3900 County Road 48, in Brazoria County, Texas. (SF 267). Prior to January 28, 1993, a number of horses and cattle were maintained on the property for petitioner's own pleasure. (SF 269-270). From approximately January 21, 1993, until January 28, 1993, Petitioner was out of the country, vacationing with friends in Mexico. (SF 270-271).

On January 28, 1993, late in the afternoon, Deputy Kevin Brumfield of the Brazoria County, Texas, Sheriff's Department, was on patrol in his vehicle, when he received a call from the dispatcher regarding a possible "cruelty to animals" complaint at 3900 County Road 48. (SF 40, 41, 100). The complaint was based upon an anonymous call received by the Sheriff's Department. (SF 40, 139). Deputy Brumfield then proceeded to 3900 County Road 48, and, proceeded to enter the property, which was posted NO TRESPASSING, on to its main drive. After proceeding some distance on this road, Deputy Brumfield observed four men sitting on and around a front-end loader. (SF 41, 102). Brumfield introduced himself, and told the men he was there about a "cruelty to animals" complaint. (SF 102, 103). He was made aware that Petitioner, Mr. Pine, was in charge of the premises, but was out of town. He did not ascertain whether any of these four men, in fact, had the authority to admit him to the premises; he assumed that the individual with whom he spoke, later identified as Wayne Reid, was in charge. (SF 41, 107, 139, 140, 147, 220, 221). Brumfield then followed Reid further back on the property, to an area that was inaccessible by car (SF 214-215), some 800-900 yards from the main entrance and not visible therefrom (SF 63), where they observed a colt that was down on the ground. (SF 63).

After his observation of the colt, Deputy Brumfield then walked back to his police vehicle, and contacted his supervisor, an Assistant

District Attorney, and the Stevens & Pruett Humane Ranch, a local not-for-profit animal shelter. (SF 50, 120). The purpose of the call to the Humane Ranch was to get a veterinarian, which Brumfield acknowledged was his own idea. (SF 120). He spoke by phone with a number of individuals at the Humane Ranch, before being advised that they could obtain the services of a veterinarian, as they had one on call, and that they would make him available to Deputy Brumfield. (SF 122, 157). Brumfield then departed 3900 County Road 48, and drove to the Humane Ranch, less than two miles away. There, after speaking with Jim Pruett, local radio personality and one of the proprietors of the Ranch, waited 30-45 minutes for the arrival of the veterinarian, a Dr. Michael Brady, D.V.M. (SF 122, 157). Brumfield, Brady and Jim Pruett then returned to 3900 County Road 48. **Brumfield had been gone from the alleged "crime scene" for 1 and 1/2 to 1 and 3/4 hours** (SF 51, 126), and the entire incident, from the time of his first arrival, until the colt was later removed, took from **2 - 3 Hours.** (SF 59).

Upon Brumfield's return to the property, the colt had now been moved to a barn in another part of the property, closer to the front, by placing the animal on some plywood, and dragging it with the front-end loader. (SF 125, 252). At that location, the colt was being treated by one of the trailer park tenants, who had veterinary medical training, and was being treated with vitamins, dextrose, antibiotics, grain, hay and water. (SF 160, 163, 249-252, 253). Dr. Brady then examined the colt, and opined that the condition of the animal was such that it needed to be removed to the Stevens and Pruett Humane Ranch. (SF 129, 164). Under Brumfield's direction, Brady, Pruett and some of the by-standers then proceeded to load the colt onto a trailer, and remove it from 3900 County Road 48 to the Humane Ranch. (SF 130, 131, 164, 242). Brumfield accompanied the animal to the Humane Ranch. (SF 132).

Petitioner returned to his property sometime during the evening of January 28. It is unclear whether he returned during the removal activities or shortly thereafter. When he became aware of what had transpired, he demanded of Deputy Brumfield the authority by which he entered his property and confiscated the colt. When Brumfield was unable to produce a warrant or any other judicial authority, Petitioner ordered Brumfield off his property and locked the barn door to attempt to stop any further unauthorized removal of his animals. The following day, Petitioner took two workmen and a horse

trailer to the Humane Ranch to retrieve his colt, but the Humane Ranch had no roads to their barn, and the mud was so deep that Petitioner was unable to get to the barn to pick up the colt. (SF 272-274, 309)

The Justice of the peace office, where Brumfield would have applied for a search and/or seizure warrant, was a mere **ten minute** drive away. (SF 61, 140). Brumfield admitted that he could easily have called for a back-up officer, to secure the premises while he went to apply for a warrant, but did not do so. (SF 149-150). Brumfield did not testify that he possessed any veterinary medical training or that his presence was required in order to treat the colt. He testified that, and the Court of Appeals so found, that by the time he and his group decided to move the animal, it was after regular business hours at the justice of the peace, and that it was difficult to contact the justice of the peace after regular business hours. Brumfield admitted that he went, the next day, believed to be a Saturday, but definitely **not during regular business hours**, and was able to obtain from that same judge, a warrant for Petitioner's arrest, and the judge's signature on a "Motion to Seize Animals", which purported to give permission to seize the colt and the remainder Petitioner's animals. (SF 150). On January 30, 1993, Brumfield, along with an army of volunteers, primarily from the Humane Ranch, returned to 3900 County Road 48, seized the rest of Petitioner's animals, and arrested Petitioner on a charge of cruelty to animals. (SF 64).

Petitioner filed a Motion to Suppress, alleging, among other things, an unreasonable search and seizure, without warrant, in violation of Petitioner's rights under the Fourth Amendment to the United States constitution. (T 5-9). After a hearing at which both Petitioner and Brumfield testified, the Motion was denied by the trial court. (SF 68).

After trial by jury, in which the State, over Petitioner's objection, introduced evidence of the condition of the colt, Petitioner was found guilty of cruelty to animals, and sentenced to probated jail time; 10 days in jail as a condition of probation, to be served on weekends; a $3,000 fine, court costs and 200 hours of community service. (SF 365-366).

As the treatment of Petitioner at the hands of the State and

Brazoria County prosecutors would not be accurately portrayed without same, pertinent parts of the chronological history of the legal proceedings brought against Petitioner are set forth herein, with citations to the record:

—January 28, 1993—colt seized without a warrant by Deputy Kevin Brumfield (SF 19, 58, 130);

—January 29, 1993—Deputy Brumfield has "Motion to Seize Animals" signed by the justice of the peace;

—January 30, 1993—Deputy Brumfield seizes other animals and arrests Petitioner (SF 20);

—February 8, 1993—hearing held before justice of the peace on civil forfeiture of animals seized from Petitioner, including colt; court awards animals to Stevens & Pruett Humane Ranch (T 33, 39, 41-44, 53-54, 58; SF 22-26);

—February, 1993—Appeal taken by Petitioner from justice court decision (T 88-91);

—April, 1993—State files information charging Petitioner with 42.11 Penal Code "cruelty to animals" with regard to **all** the animals seized (T 3);

—August, 1993—Petitioner's Motion to Suppress filed (T 5);

—September, 1993—State's Amended Information filed, charging Petitioner with cruelty to animals **as only to colt** (T 13);

—October, 1993—Appellant files objections to State's Motion to remove physical evidence from Cause No. 19,369-B, for use in the criminal proceeding, and motion to continue criminal case pending final determination in civil case; denied (T 17-22; Supplemental Transcript);

—November, 1993—Motion to Suppress heard by the Court; denied (SF 3-68).

REASONS FOR GRANTING THE WRIT

I

The Texas Court of Appeals erred in affirming the trial court's ruling denying Petitioner's Motion to Suppress and admitting into evidence testimony regarding the colt which was searched for and seized without a warrant, in violation of the Fourth Amendment to the United States Constitution, on the basis of "exigent circumstances."

Deputy Kevin Brumfield of the Brazoria County Sheriff's Department was dispatched, on January 28, 1993, in the late afternoon, to 3900 County Road 48 in Brazoria County, Texas, on an anonymous call of alleged cruelty to animals. Brumfield entered the property, upon which Petitioner resided and upon which he operated a trailer park, which was posted NO TRESPASSING, and drove some distance onto the property. He then encountered four men sitting on and around a front-end loader. He inquired about the animal cruelty complaint, and one of the men, later identified as Wayne Reid, told the Deputy that Petitioner, the person in charge of the property, was out of town. Brumfield **assumed** that Reid was in charge; there was no discussion of Reid's actual authority. Brumfield then followed Reid further back onto the property. There, Deputy Brumfield observed a colt down on the ground. Brumfield then returned to his patrol car, where he radioed his supervisor, the district attorney, and then contacted the Stevens & Pruett Humane Ranch, located within one and one-half miles of 3900 County Road 48, hereinafter, referred to as the "Humane Ranch." The Humane Ranch was operated by two local radio personalities and served, inter alia, as an animal shelter. Upon contacting the Humane Ranch, Brumfield was told that they had a veterinarian on call, and that they were going to summon him. The Deputy then departed the premises at 3900 County Road 48 and drove to the Humane Ranch. There, he made contact with one of the proprietors, who informed him that the veterinarian was on the way. Brumfield waited 30 to 45 minutes at the Humane Ranch, before the veterinarian, Dr. Michael Brady, DVM, arrived. Brumfield, Brady and Jim Pruett, one of the proprietors of the Humane Ranch, then returned to 3900 County Road 48, again without a warrant. Brumfield had been gone from 1 and 1/2 to 1 and 3/4 hours. By this time, the colt had been moved a considerable distance from the field to a barn, where the

animal was being treated by one of the trailer park tenants, who was a certified veterinary assistant with veterinary training. The justice's office was a ten-minute drive away.

Upon arrival, Dr. Brady undertook an examination of the colt, determined that its condition was poor, and that it required treatment which it was already getting in the form of vitamins, B-12, antibiotics and dextrose, as well as grain, hay and water. Brady suggested that the colt should be taken to the Humane Ranch. With Deputy Brumfield in charge, Brady, Pruett and some of the bystanders at the scene then loaded the colt onto a trailer, and Brumfield, Pruett and Brady then took the colt to the Humane Ranch.

Petitioner returned to his property sometime during the evening of January 28. It is unclear whether he returned during the removal activities or shortly thereafter. When he became aware of what had transpired, he demanded of Deputy Brumfield the authority by which he had entered his property and confiscated the colt. When Brumfield was unable to produce a warrant or any other judicial authority, Petitioner ordered Brumfield off his property and locked the barn door to attempt to stop further unauthorized removal of his animals. The following day, Petitioner took two workmen and a horse trailer to the Humane Ranch to retrieve his colt, but the Humane Ranch had no roads to their barn and the mud was so deep Petitioner could not get to the barn to pick up his colt.

Brumfield acknowledged that he could have called another officer to assist him at the scene, to secure the "crime" scene while he went to obtain the warrant. Brumfield further acknowledged that he went the next day, a Saturday, not regular business hours, and was able to get other judicial authorization signed by that same justice of the peace, on this same case. Brumfield stated, further, that he did not conduct any investigation as to the available food, care or shelter that would have been available to the colt and the other animals on the property.

Warrants are generally constitutionally required to search a person's home unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. **Mincey v. Arizona,** 437 U.S. 385, 393-394, 98 S.Ct. 2408, 2414 (1978); **Torres v. Commonwealth of Puerto Rico,** 442 U.S. 465, 471 99 S. Ct. 2425,

2430 (1979); **New York v. Quarels,** 467 U.S. 649, 104 S. Ct. 2626, 2630 n.3 (1984). The burden is on those seeking exemption from the warrant requirement to demonstrate the need for the exemption. **Arkansas v. Sanders,** 442 U.S.753,759, 99 S.Ct. 2586, 2591 (1979). JUSTICE STEWART, in the **Mincey** opinion, articulated what he considered to be objectively reasonable bases for such noncompliance with the general requirement of a warrant: the officer must reasonably believe that a **person** is in need of **immediate** aid, or to see if there are other victims or if the killer is still on the premises. 437 U.S. at 392, 98 S. Ct. at 2414, or when there is an indication that evidence was about to be removed. 437 U.S. at 394, 98 S. Ct. at 2414. As stated by JUSTICE WHITE in **Minnesota v. Dickerson,** __ U.S. __, 113 S.Ct. 2130, 2135 (1993):

> "Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are **per se** unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

See, also, **California v. Acevado,** __U.S.__, 111 S. Ct. 1982, 1991 (1991). As noted in **Arkansas v. Sanders,** supra, 442 U.S. at 759-761, 99 S.Ct. at 2590-2591, the exceptions to the requirement of a warrant are "jealously and carefully drawn."

Exigencies—Needs of Law Enforcement

The exigencies of law enforcement, in order to justify warrantless search or seizure, must be **compelling. New York v. Quarels,** supra, 467 U.S. at 653, 104 S.Ct. at 2630 n. 3. In this case, there was no indication that evidence was about to be removed from the scene of a criminal investigation; Petitioner was absent on vacation, and all other persons with whom Deputy Brumfield came into contact seemed eager to assist the Sheriff's Department, and the colt was getting all the treatment at Petitioner's ranch that it could have gotten anywhere. The reason articulated by the Texas Court of Appeals, to wit, that it was past regular business hours at the office of the justice of the peace, the judge probably wouldn't be there, and "(t)here is no evidence that if Deputy Brumfield had attempted to contact a justice of the peace, one would have been immediately available to issue a seizure warrant", 889 SW2d at 632, is not and

never has been recognized as an "exigency" or an "emergency" justifying a warrantless search or seizure. First, this statement ignores the obvious and well-established legal requirement of probable cause that must be shown by the officer seeking the warrant; there is no guaranty that the judge would have found such probable cause. Second, the Courts have found, time and time again, that the standard for this exemption to the warrant requirement is based not upon "inconvenience", but rather, "impossibility", of obtaining a warrant. **U.S. v. Hernandez-Salazar,** 813 F.2d 1126, 1131 (11th Cir. 1987); **U.S. v. Johnson,** 834 F.2d 1191, 1196 (5th Cir. 1987). Courts have specifically struck down the inability to conveniently get hold of a judge or prosecutor as a valid reason for a warrantless search or seizure. **U.S. v. Ogbuh,** 982 F.2d 1000, 1003-1004 (6th Cir. 1993) (that warrant would take an unusual amount of time because AUSA was not immediately available.); **U.S. v. Morgan,** 743 F.2d 1158, 1161 (6th Cir. 1984) cert.den. 471 U.S. 1061 (1985) ("Well, generally, we have tried to, on several occasions, to contact the judges on the weekend and either one of the judges are hard to reach on the weekend.") The generalized urgency of law enforcement is not an exigent circumstance. **Torres v. Commonwealth of Puerto Rico,** supra, 442 U.S. at 474, 99 S. Ct. at 2431.

Brumfield was gone for 1 and 1/2 hours from the scene of the "criminal investigation" (see, statement of facts, pp. 132-136, to see how little criminal "investigation" was actually done); no backup was called to be present and secure the scene while he was gone. This would certainly not be consistent with a law enforcement "exigency", and would certainly not be a valid explanation for the failure to drive the ten minutes necessary to the justice's office to apply for a warrant. The Texas Court of Appeals cites no authority, under Federal or state cases, to support its holding regarding the inability of the Deputy to quickly get hold of a judge as a basis for skipping the warrant altogether; Petitioner has cited ample authority to show that this is not a legally or constitutionally valid excuse for the failure to obtain a warrant. It is always **inconvenient** for an officer to obtain a warrant prior to a search or seizure; it is certainly not always **impossible.** Under the standard articulated by the Fourteenth Court of Appeals in this case, just about any inconvenience will suffice.

Exigencies—Medical Emergency

The facts of this case do not support the conclusion of the Court of Appeals that the alleged "medical emergency" regarding the colt, even if considered a "life-saving emergency", see, infra, was such as to make it **impossible** for Deputy Bruinfield to drive the ten minutes necessary to obtain the warrant to seize the colt. No reason is given for Deputy Brumfield's required presence at the scene, in order to preserve or protect the life of this animal, that would have made it **impossible** for Deputy Brumfield to drive ten minutes to the justice of the peace office; he had previously departed for 1 and 1/2 hours, and while gone, treatment was begun on the animal, without the Deputy's assistance or at his order. The Court of Appeals simply ignored the requirement of "impossibility".

Permitting law enforcement officers simply to enter a citizen's property and seize a sick animal, without any type of judicial authorization, is not a "reasonable" seizure. It is reasonable that a neutral magistrate should, in such instances, examine the facts to see if, indeed, there is probable cause that the crime of animal cruelty has been committed. Animals get sick and animals die on private property by the tens of thousands all of the time; it is not necessarily animal cruelty under the criminal law. As noted, infra, the Texas Animal Cruelty statute, Section 42.11, TX.PENAL CODE, requires acts or omissions **on the part of the owner** in order that a violation be shown, not just the showing of an animal in poor physical condition.

Acknowledging that it had no precedent, the Court of Appeals also ruled that saving the life of an animal was a "medical emergency", an exception to the warrant requirement. (App. A, p. 10; 889 SW2d at 631). The "medical emergency" exception to the warrant requirement occurs when a **person** is found in an unconscious or semi-conscious condition and the purpose of the search is to discover evidence of identification and other appropriate medical assistance. The rationale is that the need to protect **life** or avoid serious injury to **another** is paramount to the right of privacy and is thus justified for what would otherwise be an invalid search in the absence of an emergency. Annotation, "Lawfulness of Search of Person or Personal Effects Made Under Medical Emergency Exception to Warrant requirement." 11 **A.L.R. 5th** 52, 61 (1993); **Mincey v. Arizona,** supra, 437 U.S. at 392 (To protect or preserve a **life** is justification for what would otherwise be an invalid search.)

Generally, domestic animals do not rise to the level of human beings. 3A, **C.J.S.,** Animals, Sec. 4; **Thiele v. City and County of Denver,** 312 P.2d 786, 789 (Colo. 1957). Animals possess no legal or constitutional rights of their own. **Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium,** 836 F.Supp. 45, 49-50 (D. Mass. 1993); **Massachusetts Society for Prevention of Cruelty to Animals v. Commissioner of Public Health,** 339 Mass. 216, 158 N.E.2d 487, 495 (1959); 3A **C.J.S.,** Animals, Sec. 99. If saving a "life" is expanded to include "life" other than "human life", the medical emergency exception is greatly expanded, and is no longer "carefully drawn or carefully delineated". **Arkansas v. Sanders,** supra, 442 U.S. at 759; **U.S. v. Anderson,** 981 F.2d 1560, 1567 (10th cir. 1992). "Life" is defined, inter alia, as" (t)hat state in which animals and plants exist which distinguishes them from inorganic substances and from dead organisms: characterized by metabolism and growth, reproduction, and internally initiated adaptations to the environment." Britannica World Language Dictionary, 1964. "Life" could include, therefore, plants, animals and even invisible organisms. There is no legal basis in any of the cited cases for extending "life" to anything other than human life. There is nothing in the language of the Fourth, or any other Amendment to the United States Constitution that would recognize the rights of animals as being paramount to those of human beings. The Texas Court of Appeals' decision elevates the rescue of an animal to a legal status superior to that of a citizen's right to privacy.

As the search and seizure in this case, undertaken without a warrant, was clearly unreasonable, in violation of the Fourth amendment, made applicable to the states by the Fourteenth Amendment, **Minnesota v. Dickerson,** supra, __U.S. __, 113 S.Ct. at 2135, Petitioner's Motion to Suppress should have been granted, and all evidence with regard to the colt should have been excluded from evidence at this trial.

II.

The prosecution and punishment by the State of Texas of Petitioner under Sec. 42.11 (now, 42.09), TX. PENAL CODE, after seizure of and resulting forfeiture of Petitioner's animals in a forfeiture proceeding under Secs. 821.021, et seq., TX. HEALTH & SAFETY CODE, violated Petitioner's protection under Amendment 5 to the United States Constitution:". . .nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb," made applicable to the states by the Fourteenth Amendment.

A.

The issue of Double Jeopardy, based upon multiple punishments of Petitioner for the same offense, was decided by the Texas Fourteenth Court of Appeals in a manner sufficient for this Honorable Court to have jurisdiction thereof.

The opinion of the Texas Fourteenth Court of Appeals (App. A, at page 2; 889 SW2d at 627) states that the issue of Double Jeopardy was not raised until Petitioner's (Appellant's) Reply brief was filed with that Court (Appellant's Reply Brief, pp. 13-17), and, therefore, in the exercise of its "discretion", refuses to consider said point of error. However, the Court of Appeals, in a footnote, went on to hold that even if the Double Jeopardy claim was properly raised, Petitioner's prosecution and punishment under TX.PENAL CODE Sec. 42.11 did not constitute Federal Double Jeopardy. (App. A, p.2; 889 SW2d at 627, n.2). Further, the Court of Appeals referred to the other proceeding, by style and case number, noting that it was before the County Court at Law No. 3 of Brazoria County, Texas, the same trial court in which this Cause was heard. (App. A, p.8, n. 4; 889 SW2d at 830, n.4).

The Double Jeopardy argument raised in Petitioner's Reply Brief before the Court of Appeals, relied upon the opinion handed down by the same Texas Fourteenth Court of Appeals, **Fant v. State,** 881 SW2d 830 (Tex. App. Hous.14th 1994, p.d.r. granted), in which the Court of Appeals held that a civil seizure pursuant to Chapter 59, TX.CODE CRIM. PRO., followed by a criminal prosecution for possession of a controlled substance, violated Fant's constitutional protection against Double jeopardy. 881 SW2d at 834.

The Federal Constitutional issue is not properly before the Supreme Court if the State court rejected the constitutionality claim on state procedural grounds. **Ulster County Court v. Allen,** 442 U.S. 140, 148, 99 S.Ct. 2213, 2220 (1979); **Hammerstein v. Superior Court of California,** 340 U.S. 622, 623, 71 S.Ct. 521 (1951). However, where it is clear that the merits of the constitutional claim were reached, and that the state court actually consid-

ered and decided the Constitutional claim, the issue is properly before the Supreme Court. **Aetna Life Insurance Company v. Lavoie,** 475 U.S. 813, 819, 106 S.Ct. 1580, 1584 (1986); **Ulster County Court v. Allen,** supra, 442 U.S. at 153, 99 S.Ct. at 2222; **Cohen v. Coweles Media Co.,** 501 U.S. 663, 667, 111 S.Ct. 2513, 2517 (1991). In **International Longshoreman's Association, AFL-CIO v. Davis,** 476 U.S. 380, 386, 106 S.Ct. 1904, 1910 (1986), this Court stated:

> "The Alabama Supreme Court, although holding that the ILA's pre-emption claim had been waived, stated **in a footnote** that if it had occasion to reach the merits, it would have found no pre-emption." (Emphasis added).

This is exactly what the Texas Fourteenth Court of Appeals did in its opinion. (App. A, pp. 2,8; 889 SW2d at 627,630). By the above-noted citations and references, the Court of Appeals indicated that: 1) it was aware of and had before it the civil forfeiture proceeding being brought concurrently by the State against petitioner; 2) the Court would not stay one proceeding while the other was being litigated; and 3) notwithstanding its exercise of "judicial discretion", would have ruled against Petitioner in any case. In order for the Court of Appeals to perform its analysis, albeit brief, contained in the aforementioned footnotes, it, of necessity, would have had to have reviewed the **Fant** decision, supra, and the Constitutional questions decided therein, and applied them to the proceedings in this case.

Petitioner submits that the Court of Appeals did reach the merits of Petitioner's claim pertaining to Double Jeopardy, and that his claim is properly before this Court.

B

The criminal prosecution and punishment of Petitioner under Sec. 42.11, TX.PENAL CODE, after the State had already initiated, by the seizure of the colt and other animals, a civil forfeiture on the grounds of alleged cruelty to animals under Secs. 821.021, et seq., TX.HEALTH & SAFETY CODE, violated the Fifth Amendment to the United States Constitution, as putting Petitioner twice in jeopardy for the same offense.

Sec. 42.11, TX.PENAL CODE (effective Sept. 1, 1994, Sec.

42.09, TX.PENAL CODE), reads, in pertinent part, as follows:

> "(a) A person commits an offense if he intentionally or knowingly:
>
> * * *
>
> "(2) fails unreasonably to provide necessary food, care or shelter for an animal in his custody."
>
> * * *

Secs. 821.021, et seq., TX. HEALTH & SAFETY CODE, provide in pertinent part as follows:

> "(Sec. 821.021) In this subchapter, 'cruelly treated' includes tortured, seriously overworked, unreasonably abandoned, **unreasonably deprived of necessary food, care or shelter,** cruelly confined or caused to fight with another animal. (Emphasis added).
>
> "(Sec. 821.022[a]) If a county sheriff, constable, or deputy constable or an officer who has responsibility for animal control in a municipality has reason to believe that an animal has been or is being **cruelly treated,** he may apply... for a warrant to seize the animal. (Emphasis added).
>
> "(Sec. 821.022[b]) On a showing of probable cause to believe that the animal has been or is being **cruelly treated,** the court shall issue the warrant and set a time within 10 days of the issuance for a hearing in the court to determine whether the animal has been **cruelly treated.** (Emphasis added).
>
> "(Sec. 821.022[c]) The officer executing the warrant shall give written notice to the owner of the animal of the time and place of the hearing.
>
> "(Sec. 821.023[a]) **A finding in county court that the owner of an animal is guilty of an offense under Section 42.11 Penal Code, involving the animal is prima facie evidence at a hearing authorized by Section**

821.022 that the animal has been cruelly treated. (Emphasis added).

"(Sec. 821,023[d]) Except as provided by Subsection (e), if the court finds that the animal's owner has **cruelly treated** the animal, the court shall:

* * *

"(2) order the animal given to a nonprofit animal shelter, pound or society for the protection of animals. (Emphasis added).

"(Sec. 821,023[g]) The court shall order the animal returned to the owner if the court **does not find that the animal's owner has cruelly-treated the animal."** (Emphasis added).

This Court has often held that the Double Jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. **U.S. v. Halper,** 490 U.S. 435, 440, 109 S.Ct. 1892, 1987 (1989). There has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. **Ex Parte Lange,** 85 U.S. 163, 168 (1873). This Court has also previously held, in an Eighth Amendment case, that a civil in rem forfeiture of property may constitute a "punishment". **Austin v. U.S.,** __ U.S. __, 113 S.Ct. 2801 (1993). Both **Halper** (in a Fifth Amendment case) and **Austin** (in an Eighth Amendment case) hold that the notion of punishment cuts across the division between the civil and the criminal law. Compare, **Halper,** supra, 490 U.S. at 448, 109 S.Ct. at 1901, with **Austin,** supra, __U.S. at __, 113 S.Ct. at 2805.

"To that end, the determination of whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may be fairly said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment."

U.S. v. Halper, supra, 490 U.S. at 448, 109 S.Ct. at 1901-1902. This constitutional protection is intrinsically personal and only the character of the actual sanctions can substantiate a possible Double Jeopardy violation. **Department of Revenue of Montana v. Kurth Ranch,** __U.S.__, 114 S.Ct. 1937, 1946 (1994).

JUSTICE O'CONNOR's analysis of the history of civil forfeiture in **Austin,** supra, __U.S. at __, 113 S.Ct. at 2806-2810, indicates in rem forfeiture as being "punitive" in nature, despite legal fictions such as "the thing itself is primarily the offender", etc. The **Austin** opinion also notes the presence of an "innocent owner" defense in the statute in question, __U.S. at __, 113 S.Ct. at 2810, and notes that such provision "serve to focus the provisions on the culpability of the owner that makes them look more like punishment, not less." __U.S. at __, 113 S.Ct. at 2810-2811. It has further been held that a civil sanction that cannot fairly be said to serve **only** a remedial purpose, but rather can only be explained as **also** serving either retributive or deterrent purposes, is punishment. **Austin,** supra, __U.S. at__, 113 S.Ct. at 2812; **Halper** supra, 490 U.S. at 448, 109 S.Ct. at 1902. It has also been held to be immaterial whether the civil penalty precedes or follows the criminal proceeding. **U.S. v. Sanchez-Escarino,** 950 F.2d 193, 200 (5th Cir. 1991) cert.den. __U.S.__, 113 S.Ct. 123 (1991); **U.S. v. Mayer,** 897 F.2d 1126, 1127 (11th Cir. 1990) cert.den. __U.S.__, 111 S.Ct. 178 (1990).

As set out in the procedural history, set forth, supra, Petitioner's colt was seized by the Deputy Sheriff on January 28, 1993, and the remainder of the animals, some 16 others, were seized on January 30, 1993. On February 8, 1993, a hearing was held before the Brazoria County justice of the peace, which resulted in an order that all of Petitioner's animals, including the colt, be "donated" to the Stevens & Pruett Humane Ranch. That ruling was appealed pursuant to State law, and only after this appeal was filed, did the State decide to commence its criminal prosecution of Petitioner in this case. As set forth, this prosecution resulted in a sentence of probation, weekend jail time, a monetary fine and required community service time, in addition to the loss of animals through the forfeiture, including the colt.

The civil forfeiture of animals, provided under Secs. 821.021, et seq., TX.HEALTH & SAFETY CODE, is based solely upon a find-

ing of the culpability of the owner thereof: if the justice of the peace finds that the animals were "cruelly treated" (note: same definition of "cruelly treated" as the penal code provision), the justice has the option of either selling the animals, or donating the animals to a non-profit animal shelter. Significantly, if the justice finds that the animals are not "cruelly treated", they are returned to the owner. ("Innocent owner defense", which JUSTICE O'CONNOR has held makes it look more like a punishment.) There is no question in this case of recoupment of the costs of law enforcement or any similar argument. See, **Halper,** supra, 490 U.S. at 452, 109 S.Ct. at 1903; **Kurth Ranch,** supra, __U.S. at __, 114 S.Ct. at 1945. The State will undoubtedly argue that the statute providing for civil forfeiture for cruelly-treated animals also serves a remedial purpose, i.e., the removal of cruelly-treated animals from an abusive owner and unhealthy environment, and placing them in an allegedly more hospitable surroundings. Even, for argument's sake, conceding some remedial purpose, the forfeiture is still obviously punitive and tied to the culpability of the owner, and, the punishment provided is the confiscation of the animals from their owner. As previously noted herein, all that is required by the decisions of this Court for a civil forfeiture to constitute "punishment" for Constitutional purposes is that it have **some** punitive purpose, even if it has other "remedial" purposes.

In addition, Sec. 821.023(a), TX.HEALTH & SAFETY CODE, provides that if there is a conviction under TX.PENAL CODE Sec. 42.11, the State acquires a presumption of "cruel treatment" in a subsequent civil forfeiture proceeding. The tying together of the criminal and civil proceedings is further indication of "multiple punishments" for the same offense. Compare, **Kurth Ranch,** supra, __U.S. at__, 114 S.Ct. at 1497:

> "In this case, the tax assessment not only hinges on the commission of a crime, it is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the obligation in the first place."

In this type of case, the article seized is not, per se, unlawful or looked upon with suspicion or disfavor, such as illegal drugs, gambling paraphernalia, alcoholic beverages, etc. There is no question of the retention of illegally acquired gains, such as income taxes lawfully due but not paid, such as discussed in **Helvering v. Mitchell,**

303 U.S. 391, 58 S.Ct. 630 (1938), wherein the penalty and forfeiture provisions which were available in addition to criminal prosecution for tax evasion, were referred to as "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." 303 U.S. at 401, 58 S.Ct. at 634. There are also no questions of damages or reparations in addition to criminal penalties, nor is there a question of two different sovereignties (U.S. and state governments) prosecuting a defendant. See, **Moore v. Illinois,** 55 U.S. 13, 19-20 (1852).

This situation is, Petitioner submits, more than a mere "technicality"; it is a real, unfair and unconstitutional deprivation of Petitioner's rights as an American citizen. To interpret the United States Constitution as permitting a government to initiate multiple prosecutions, concurrently, against a citizen for the same conduct, resulting in multiple punishments (loss of animals, monetary fine, jail time, etc) causes a result tolerated neither by the language of the constitutional Amendment itself, nor by the aforecited case law. The State of Texas, in this case, as noted in the summary of procedural history set forth, supra, removed evidence from the civil forfeiture, and used it in the criminal proceeding; the same persons testified in both proceedings, and the State was able to move back and forth between the two proceedings to suit its own purposes. (See, e.g., SF 137, 138, 146, 171, 172, 194, 241, 260). The State of Texas is certainly entitled to enforce its laws against animal cruelty, and would certainly not be prevented from doing so, if this Court should hold that it cannot do so multiple times for the same conduct.

WHEREFORE, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GEORGE W. LANG II
Attorney at Law
7330 Woodoak
Houston, Texas 77040
(713) 937-0650

Attorney for Petitioner